SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 330

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Wisconsin.

To the Honorable, the Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari issue to review the decision of the Supreme Court of Wisconsin, entered in the above entitled case on May 2, 1950, motion for rehearing denied June 30, 1950.

OPINIONS BELOW.

The opinion of the Circuit Court for Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. (2d) 477.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Sections 111.50-111.61 thereof, and a judgment based on such statutes, is drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stats. 136; 29 U. S. C., Sections 141-197; and

(b) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprived petitioners of liberty and property without due process of law and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Wisconsin Employment Relations Board (R. 124-125, 145-146, 158), before the

Board of Arbitration (R. 161), before the Circuit Court for Milwaukee County (R. 102-103, 113-114) and before the Supreme Court of the State of Wisconsin (see decision, R. 236) that Sections 111.50-111.65 of the Wisconsin Statutes and more particularly Sections 111.50-111.61, as construed, were unconstitutional and void and of no effect whatsoever because they were repugnant to the provisions of the United States Constitution referred to immediately hereinabove.

The federal question of whether the Wisconsin Statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised, therefore, before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. No specific treatment of the constitutional questions was made in the opinion since this case had been argued with the companion case now before this Court on petition for a writ of certiorari, being case No. ....., October Term 1950. In its decision in that companion case the Court passed specifically upon the Federal constitutional questions raised. In the instant case the Court referred to its opinion in the companion case and stated:

> "With one exception the contentions of the appellants in this case were raised in the companion case and were determined therein" (R. 236).[1]

In affirming the judgment of the Circuit Court, it necessarily affirmed that court's ruling (R. 102-103) that the statute was not in violation of the Federal Constitution.

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1 The remaining contention dealt with in the opinion was based upon the Wisconsin Constitution.

Thus, the Wisconsin Supreme Court has held that the State of Wisconsin can, over the objections of employees of a public utility, compel such employees to submit a dispute over wages, hours and working conditions to an ad hoc arbitration tribunal appointed by the State, and be bound by such tribunal's determination for a period of one year; and that such procedure is not in violation of any provision of the Constitution of the United States.

QUESTION PRESENTED.

Whether a State may by statute require employees of a "public utility" employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike.

STATE STATUTES INVOLVED.

The pertinent state statutory provisions are printed in Appendix A to this petition. They may be summarized as follows:

Where a dispute arises between a "public utility employer," as defined in Section 111.51 (1), and its employees, which dispute may result in the interruption of an "essential service," as defined in Section 111.52 (2), and if the collective bargaining process has reached an impasse and stalemate which in the opinion of the Wisconsin Employment Relations Board has occurred notwithstanding good faith efforts on the part of both sides, either party to such dispute may petition the State Board to appoint a conciliator from a panel previously created by it (Section 111.54).

If the conciliator is unable to effect a settlement of the dispute, a board of arbitration is convened, which has the duty to hear and determine the dispute (Section 111.55).

Certain standards are established with which the arbitrator's decision must comply (Secs. 111.57 and 111.58).

The award of the arbitrators is filed with the Circuit Court of the County in which the dispute arose and, unless reversed upon appeal, is binding on the parties for a period of one year (Sec. 111.59). During the pendency of the arbitration process no change may be made in existing wages, hours and conditions of employment by either party without the consent of the other (Sec. 111.56).

Strikes are absolutely prohibited (Sec. 111.62).

STATEMENT.

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the "union" or "Division 998," is an unincorporated, voluntary labor organization. It is the collective bargaining representative of all of the employees of The Milwaukee Electric Railway and Transport Company, hereinafter referred to as the employer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 108-110, 130-131).

The individual petitioners are officers of the union who are acting as individual employees and as representatives of all other employees, as well as in their official capacity (R. 109).

The respondents Wisconsin Employment Relations Board and its members (hereinafter referred to as the Board) comprise an administrative agency created by Sec. 111.03, Wisconsin Statutes.

The respondent members of a Board of Arbitration were appointed pursuant to Sec. 111.55 of the Wisconsin Statutes (R. 143, 159).

The respondent, Milwaukee Electric Railway & Transport Co., is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce. The rolling stock, equipment and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired before these proceedings being in excess of $2,000,000. Its gross operating revenue exceeds $16,000,000 annually and it transports in excess of 100,000,000 passengers annually. Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 130-132).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to the provisions of Section 8 (a) 3 and Section 9 (e) (R. 132).

A contract between the union and the employer covering wages and working conditions of the employees represented by the union expired December 31, 1948. More than 60 days prior to that date and in accordance with the contract and the law, the union submitted to the employer written proposals for certain specified changes in the old contract and requested a conference for the purpose of bargaining on such proposals. The employer also sent a written notice to the union, 60 days prior to December 31, 1948, stating that it was therewith terminating and cancelling said contract as of December 31, 1948 (R. 165-166).

The parties negotiated for a new contract during November and December of 1948, but arrived at no agreement (R. 134, 166). The union offered to settle the controversy by submitting the same to a voluntary arbitration tribunal, but the employer refused such offer (R. 134).

Representatives of the Federal Conciliation and Mediation Service attempted to settle the dispute and were still attempting to do so when the jurisdiction of the state Board was invoked (R. 135).

On December 31, 1948, the company petitioned the Wisconsin Employment Relations Board, under the terms of Sections 111.54 and 111.55 of the Wisconsin Statutes, to appoint a conciliator (R. 119).

The union protested the appointment of a conciliator as well as the jurisdiction of the Wisconsin Employment Relations Board to do so, alleging, among other things, that the statutes invoked were contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that they were in conflict with the Act of Congress known as the Labor Management Relations Act, 61 Stats. 136, 29 U. S. C., Sections 141-197, and also contrary to the Fourteenth Amendment to the Constitution of the United States (R. 124-130).

The union's objections were overruled and a conciliator was appointed. The union participated in the conciliation proceedings as a matter of courtesy to the conciliator, reserving, however, all objections to the validity of the statute and of the proceedings (R. 137, 142, 152).

At about this time a threatened strike of the employees was restrained, on application by the Board, in the proceedings which are the subject of a separate Petition for Writ of Certiorari filed simultaneously with the filing of the instant petition.

On the 31st day of January, 1949, the conciliator reported to the Board that he had been unable to effect a settlement within the time allotted (R. 141-143).

Accordingly, the Board proceeded to the appointment of a three-man board of arbitration, in compliance with the statutes (R. 143-144, 158). The union participated in the proceedings leading to the appointment of the arbitrators and in the proceedings before the arbitration board without waiver of or prejudice to its challenges to the validity of the law, taking the position that such participation was under the duress and coercion of the law which, by precluding the union from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, placed in jeopardy such rights as job-security, pensions, and maintenance and improvement of hours, wages and other working conditions (R. 157-158, 164, 223).

During the proceedings leading to the appointment of the arbitrators the union challenged the good-faith efforts of the employer in attempting to arrive at a settlement of the dispute, alleging that the employer had been using the Wisconsin Statutes as a shield against its duty and obligation under federal statutes to bargain collectively and in good faith, and had been relying upon automatic invocation of the Wisconsin law to relieve it from those duties and obligations (R. 145-151, 151-154).

Prior to the introduction of evidence before the board of arbitration the union filed a charge against the employer with the National Labor Relations Board alleging violation of the National Labor Relations Act by the employer in that it had failed to bargain collectively and in good faith (R. 224-225). That matter is still pending before the National Board.

After taking evidence from the parties, the Board of Arbitration issued its decision and order which was filed,

as required by statute, with the Clerk of the Circuit Court, Milwaukee County (R. 162-222).

The union duly filed a petition for review with the Circuit Court for Milwaukee County, in which it attacked the entire proceedings before the Wisconsin Employment Relations Board and the Board of Arbitration on the principal ground that the statutes under which the proceedings were conducted were null and void because in violation of the Constitution of the United States and the State of Wisconsin.

On February 17, 1950, the Circuit Court issued its memorandum opinion sustaining the validity of the statutes (R. 101-106). Judgment was accordingly entered on February 23rd, 1950 (R. 225-226).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 237); rehearing was denied (R. 239).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65 were not in conflict with Sections 7 and 13 (29 U. S. C., Secs. 157 and 163) of the National Labor Relations Act, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

2. In holding that Sections 111.50-111.65 were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In affirming the judgment of the Circuit Court of Milwaukee County, dismissing petitioners' action to set aside all orders, decisions and awards of the Wisconsin Employment Relations Board and the Board of Arbitration.

REASONS FOR GRANTING THE WRIT.

This case is a companion case to Case No. ....., October Term, 1950, in which a Petition for Writ of Certiorari has been filed simultaneously with the instant Petition. Both cases arose out of the same dispute and involve the same statute and the same question of law. Case No. ..... grows out of the issuance of an injunction based upon the provisions of the state law making it a crime for public utility employees to engage in concerted strike activities. This case grows out of the attempt on the part of the state to compel the parties to the dispute to submit such dispute to an arbitration tribunal appointed by the state. The reasons for the granting of the Writ, therefore, are virtually the same in both cases. Rather than burden the court with repetition of the reasons for granting the Writ in this petition, petitioners will limit their argument herein to those which are peculiar to the arbitration provisions of the law.

I.

The Law Is Contrary to the Provisions of Article I, Section 8, and Article VI of the Constitution of the United States Because Repugnant to and in Conflict With the Provisions of the Labor Management Relations Act, 1947, 61 Stats. 136.

In the instant case the employer and its employment relations are clearly within the scope of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. II, 141-197, and subject to the jurisdiction of the National Labor Relations Board (R. 120-132). **National Labor Relations Board v. Baltimore Transit Company,** 140 F. 2nd 51 (C. A. 4, 1944), cert. den., 321 U. S. 796. Such jurisdiction is conclusively demonstrated in this case since, in

December, 1947, the National Labor Relations Board actually assumed jurisdiction over the employer and its operations, conducted an election pursuant to the terms of the Labor Management Relations Act and certified that the petitioning union had successfully complied with Section 8 (a) (3) of the Act relating to union security elections (R. 132).

Additionally, prior to the convening of the Arbitration Board, the union filed charges against the employer with the National Labor Relations Board alleging that in connection with the dispute between the parties the employer had committed and was continuing to commit unfair labor practices in violation of the federal law in that it was not bargaining in good faith with the union. These charges are still pending before the Board (R. 224). Representatives of the federal mediation and conciliation service have also attempted to bring about the settlement of the dispute (R. 134-135).

Since the business of the employer is such that its labor relations are covered by the National Act, and since the National Board had previously assumed jurisdiction over such relationship, the principle that the state law must yield where there is conflict or where the federal congress has pre-empted the field becomes directly applicable. **Allen Bradley Local Union 1111, etc. v. Wisconsin Employment Relations Board**, 315 U. S. 740; **Hill v. Florida**, 325 U. S. 538; **Bethlehem Steel Company v. New York State Labor Relations Board**, 330 U. S. 767; **LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Plankinton Packing Company v. Wisconsin Employment Relations Board**, 338 U. S. 953; **International Union of United Automobile, Aircraft and Agricultural Workers of America, C. I. O., etc., et al., v. O'Brien** (Case No. 456, October Term, 1949).

The conflict in the instant case arises out of the compulsory arbitration provisions of the state law and Section 7 of the National Labor Relations Act, as well as the general scheme and pattern of such Act.

Section 7 provides as follows:

"Rights of Employees.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

The leading features of the state law which petitioners claim conflict with this national policy are: (a) compulsory arbitration, as provided in Sections 111.57-111.60, Wisconsin Statutes, and (b) prohibition, under penalty and by injunctive process, of concerted quitting of work by employees in furtherance of their wage and working conditions demands (Secs. 111.62-111.63).

In view of the legislative declarations of separability in the state law (Section 111.65), this petition is confined to the compulsory arbitration features separately from the prohibition on strikes, although it is obvious that the two features are inherently interrelated and intended to be mutually compensatory.

A. The threat of compulsory arbitration created by statute, in advance of and during negotiations between employer and employees, destroys the integrity and reality of the collective bargaining process; the committees of the Eightieth Congress which reported the bills that became the Labor Management Relations Act, 1947 (H. R. 3020 and S. 1126), studied and deliberately rejected proposals for compulsory arbitration in favor of retention of a national policy of collective bargaining.

The practice of collective bargaining, as it has developed historically, and as it is protected by Section 7 of the Federal Labor Act, necessarily excludes the subjecting of the participants to a threat (or promise), even before the parties sit down to negotiate, of a governmental decision concerning wages and working conditions if the parties disagree.

If the alternative to a stalemate in negotiations is the right of the parties to obtain the decision of a tribunal as to the disputed terms, then the process of negotiation is, from its very inception, **not a bargaining for services, but a compromise of the hazards of the tribunal's decision.** In such a situation the resulting compromise—if there is a compromise rather than a resort to the tribunal—is not a result of a free bargain for the employees' services, and does not represent the fair value which could be obtained therefor by genuine collective bargaining.

Among the findings set forth by Congress in Section 1 of the Labor Management Relations Act of 1947 is included the finding that the inequality of bargaining power of employees who do not possess full freedom of association, or actual liberty of contract, burdens and affects the flow of commerce and tends to aggravate a recurrent business depression by depressing wage rates and purchasing power of wage earners in industry. The public policy of the

United States is declared to be, in Section 1, to eliminate these and other stated obstructions to commerce

> "* * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Obviously, the state has no power to supply a different and diluted substitute for the process of full and free collective bargaining as prescribed by Congress for the national economic health, even though the state legislature may believe its substitute to be just as good for the workers involved, and better for the rest of the population, than the remedy prescribed by Congress. The remedy prescribed by Congress in Section 7 includes, as a necessary, although sometimes bitter, ingredient, the ultimate right to strike, because without it there cannot be genuine collective bargaining.

In the Eightieth Congress, during which the operation of the National Labor Relations Act (the Wagner Act, enacted in 1935) was subjected to great criticism, and during which that Act was amended in many important respects by the Labor Management Relations Act, 1947, proposals were made and studied for legislation to modify the collective bargaining process by substituting for the right to strike or lockout, a national policy of compulsory arbitration in public utility and other important industries; but such proposals were rejected.

The Senate Committee on Labor and Public Welfare, headed by Senator Taft, made a report, accompanying Bill S. 1126. This Bill, with Bill H. R. 3020, reported by the House Committee on Education and Labor, headed by

Representative Hartley, became the Labor Management Relations Act of 1947. In the Senate report the following statement appears:

> "In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation."
>
> (Senate Report No. 105 on Bill No. S. 1126; Legislative History, L. M. R. A. 1947, at page 419, Gov't Prtg. Office.)

Before the House Committee on Education and Labor which reported Bill H. R. 3020, the then Secretary of Labor (Lewis B. Schwellenbach) testified on March 11, 1947, as follows:

> "**Compulsory arbitration is the antithesis of free collective bargaining.** Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, **but will frequently encourage one or both of the disputants to make only a pretence of bargaining in anticipation of a more favorable award from an arbitrator than would be realized through their own efforts.** The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such

an attitude, the use of conciliation and mediation procedures would decline concurrently. Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes" (quoted in Legislative History, page 392). (Emphasis ours.)

Senator Taft, co-author of the Bill and its manager on the floor of the Senate, upon consideration of Bill S. 1126, on April 23, 1947, pointed out that the enactment of legislation for compulsory arbitration would interfere with the genuine practice of collective bargaining. He told the Senate (93 Cong. Rec. 3835):

"We did not feel that we should put into the law, as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would reecive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided" (93 Congressional Rec. 3951-3952; Legislative History, page 1008).

A further statement was made by Senator Taft on consideration of amendments to Bill S. 1126 (93 Cong. Rec. 5116):

"The bill does not provide for compulsory arbitration. The cases in Australia cited by the Senator from Kentucky occurred because labor there secured such a

stranglehold, if you please, through statutes and otherwise on the economy of Australia, that finally the country was driven to compulsory arbitration, and, of course, it failed. Our bill does not provide for compulsory arbitration. It seeks to reduce the power of certain unions so that when the parties come to the collective bargaining table there will be free collective bargaining in which each side will have the right to present its demands, but neither side will present any unreasonable demands, on the theory that they have such unreasonable power that they can enforce unreasonable demands.

"So, Mr. President, the bill reaffirms the principle of the Wagner Act. It restores in this country the free collective bargaining today which both management and labor groups recognize must be the basis for satisfactory labor relations tbetween employer and employee." (Emphasis ours.)

There can really be no such thing as good faith collective bargaining under the National Act where the state provides for compulsory arbitration as a sort of rear-door through which either party may escape from its obligations and transfer its duty of making a contract to the state.

The availability of the compulsory arbitration procedure provides a release from the unremitting economic stress to stay at the give-and-take process of the bargaining table until a voluntary agreement is reached, because, instead of allowing the force of economic pressures to break a stalemate or impasse, this statute permits either of the parties to escape from the responsibility, often heavy, of making concessions.

It is respectfully submitted that compulsory arbitration in labor relations affecting commerce was deliberately rejected in the Eightieth Congress; that the intention of the Eightieth Congress, in the adoption of the 1947 amend-

ments to the National Labor Relations Act, was to retain, as a national policy in labor management relations affecting interstate commerce, the full and free processes of collective bargaining, undiluted and unimpaired by the previous restraints therein which would be created by compulsory arbitration machinery.

B. **There is also specific conflict between the State and the Federal Law as they relate to collective bargaining.**

Not only does the general scheme of compulsory arbitration embodied in the state law conflict with the federal law, but specific provisions of the Wisconsin law also demonstrate irreconcilable conflict:

1. The arbitration process of the Wisconsin law cannot be invoked by either party to the dispute, unless an impasse or stalemate occurs, in spite of good-faith collective bargaining (Section 111.54). It would appear that, conversely, if the stalemate occurs where either party has not bargained in good faith, it is the state policy to keep hands off, at least insofar as compulsory arbitration is concerned, although the prohibition against strikes still remains.

The determination as to whether or not there has been a refusal of either party to bargain in good faith is made in the first instance by the state board. However, since the employer here is subject to the federal act, exclusive jurisdiction to make such determination is vested in the National Labor Relations Board. **Plankinton Packing Co. v. Wisconsin Employment Relations Board**, supra.

In the instant case the petitioner in fact invoked the superior jurisdiction of the National Board to make such determination. In spite of this, the state board unlawfully assumed such jurisdiction and made such determination, primarily to compel the parties to submit to state-conducted and state-enforced arbitration.

It is also obvious that, under this provision of the Act, either an employer or a union can prevent the compensatory remedy of compulsory arbitration in lieu of strike from being invoked by refusing to bargain in good faith. Where the employer refuses to bargain in good faith, the state cannot invoke the compulsory arbitration process, the members of the union cannot strike, and the entire policy of the federal act is thereby frustrated.

2. There is also specific conflict in view of Section 111.58 of the state act which provides "that the arbitrator shall not make any award which would infringe upon the right of the employer to manage his business." The state thus removes from the area of relief which can be granted to the employee those matters over which the employer and union must bargain collectively. In the instant case this section became directly involved in connection with a union request that certain types of employees be maintained on certain shifts. The Board of Arbitration refused to grant such request, solely because of its lack of power to do so under the above quoted provision of the statute (R. 198).

The process of collective bargaining and the entering into of signed agreements incorporating the results of such bargaining must of necessity infringe in some way or other upon the right of the employer to manage his business in the absolute and unrestricted sense. Any concession made by an employer during the process of collective bargaining results in such infringement.

Under federal law any matter dealing with wages, hours or conditions of employment is a proper subject for collective bargaining, subject only to compliance with legislative regulation of the same subject. **Matter of Consumers' Research, Inc.**, 2 N. L. R. B. 57; **Matter of Timken Roller Bearing Co.**, 70 N. L. R. B. 500; **National Labor Relations Board v. Inland Steel Co.**, 170 F. 2nd 247 (C. A. 7,

1948) cert. den. 336 U. S. 960. So here the state has not only relieved the employer from its duty to bargain collectively by providing the rear exit of compulsory arbitration, but at the same time has precluded the employees from attaining in the compulsory arbitration process that which they might have otherwise attained in collective bargaining.

The two examples given herein of direct conflict and inconsistency serve to underline the basic soundness of the decision which preclude the state from adopting legislation in a field which has been pre-empted, or, if not pre-empted, where federal regulation and state regulation cannot consistently stand side by side.

II.

The Wisconsin Law Is in Violation of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of Wisconsin has held that the provisions of the law do not make unlawful delegation of legislative or judicial powers in violation of the Constitution of the State. **United Gas, Coke & Chemical Workers of America, Etc., v. Wisconsin Employment Relations Board**, 255 Wis. 154, 38 N. W. (2) 692. The law, as interpreted, therefore, is in essence an attempt on the part of the legislature itself to establish wages, hours, and working conditions of the employees for a period of one year.

Previous attempts by a state to do just this were stricken down by this Court in **Wolf Packing Co. v. Court of Industrial Relations**, 262 U. S. 522, and 267 U. S. 552. In the latter case this court held that such attempted wage finding was a curtailment of the right of contract contrary to the due process clause of the Fourteenth Amendment.

In only one case did this court sustain legislative action which approaches the type of action taken by the State of Wisconsin. In **Wilson v. New**, 243 U. S. 332, the federal Congress, when confronted with a grave national emergency as a result of a threatened strike involving all railroads in the country, enacted legislation purely temporary in nature, insofar as wages were concerned, and which neither prohibited strikes, nor compelled arbitration. This court upheld the right of the Congress to establish a daily work standard in view of its paramount power in the regulation of interstate commerce, and further sustained its right to establish for a limited period, pending further investigation, a wage standard based upon such daily work standard. In the subsequent **Wolf Packing Co.** case, supra, the court pointed out that in the **Wilson** case, supra, it had gone "to the borderline" under the peculiar facts of that case. 262 U. S. 522, 544.

In the instant case Wisconsin asserts the right to define "essential service" in an all-embracing fashion, without regard to the actual facts as they exist, and to impose its own conception of adequate wages, hours and working conditions upon employees engaged in such "essential service", at the same time holding such employees to labor under such imposed condition, except for the theoretical, unreal, and practically unfeasible right of quitting such labor as an individual. It is respectfully submitted that such attempted regulation cannot stand consistently with the protection afforded by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in the companion case of **Amalgamated Association of Street, Electric Railway and Motor Coach Em-**

ployees of America, Division 998, et al., v. Wisconsin Employment Relations Board, the petition in which has been filed concurrently with the instant petition, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID PREVIANT,
Counsel for Petitioners.

ALFRED G. GOLDBERG,
SAUL COOPER,
Of Counsel.

APPENDIX A.

Wisconsin Statutes.

SUBCHAPTER III.

Public Utilities.

111.50 **Declaration of Policy.** It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 **Definitions.** When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat,

gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employes.

(2) "Essential service" means furnishing water, light heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 **Settlement of Labor Disputes Through Collective Bargaining and Arbitration.** It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53. **Appointment of Conciliators and Arbitrators.** Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal

with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 **Conciliation.** If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 **Conciliator Unable to Effect Settlement; Appointment of Arbitrators.** If the conciliator so named is unable

to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 **Status Quo to Be Maintained.** During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 **Arbitrator to Hold Hearings.** (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employes having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employes. The foregoing enumeration of factors shall not be construed as preclud-

ing the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 **Standards for Arbitration.** The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 **Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.** The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit of the county wherein the dispute arose or where the majority of the employes involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed be-

tween the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

111.60 **Judicial Review of Order of Arbitrator.** Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61 **Board to Establish Rules.** The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 **Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.** It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work

stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 **Enforcement.** The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 **Construction.** (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 **Separability.** It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.